

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, April 30, 2015
9:37 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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P R O C E E D I N G S

2 THE COURT: We're not fully informed yet but one of
3 the jurors is ill. He was in the bathroom throwing up and he's
4 seeing the nurse right now. So that's what we're trying to
5 get. I don't know whether he'll be able to continue today or
6 not. But I just wanted to bring that up because that obviously
7 has implications. We have to have the Russian witnesses today.

8 So I don't have any more to say than that except I
9 think we may be facing the necessity to excuse him if he can't
10 continue and we have to go forward, which would mean bringing
11 in the first alternate.

12 MR. WEINREB: Is there the potential of delaying and
13 sitting tomorrow instead if the rest of the jurors are amenable
14 to that?

15 | THE COURT: We could do that, probably.

16 MR. WEINREB: If it's just a one-day thing and it
17 seems like it would --

18 THE COURT: Let's get a report from the nurse. That's
19 an interesting idea.

20 MR. WEINREB: It's different if he has the flu and
21 he'll be out for weeks.

22 THE COURT: You don't have to comment. I just wanted
23 to let you know we're in the process of dealing with the issue.
24 We'll let you know when we know more.

25 MR. WEINREB: All right.

1 | (The proceedings adjourned at 9:38 a.m.)

(The proceedings resumed at 9:52 a.m. Attorneys Chakravarty and Fick are not in attendance.)

4 THE COURT: So I have talked to the nurse who has
5 consulted with him -- I was going to say "examined." I'm not
6 sure if that's literally true or not. But anyway, she feels he
7 is not able to continue today. He is suffering from migraines.
8 He doesn't have his migraine medicine, which is causing the
9 problem, I guess. And she said it's only going to get worse
10 during the day. He's trying to talk her into saying he's fine
11 and he can do it, but she said there's a risk that he's just
12 going to get worse during the day.

I understood that to indicate that if he had his migraine medicine he'd be better, so there's some possibility that that would be the case. So if everybody is willing to take up the suggestion that we just punt until tomorrow, I think that's probably the better course and would not require any personnel change in the jury, which I think is desirable if we could avoid it. But that may be a possibility if he's in the same condition tomorrow. If he's not able to continue, we can't keep doing that and we have to get these witnesses done.

22 MS. CONRAD: Do we know if the rest of the jurors are
23 available tomorrow?

THE COURT: We'll find that out. If there's a problem
there, we'll obviously let you know. So they -- I think --

1 because it was obvious, I guess, they know that he's ill. Now,
2 timing wise that's going to work out?

3 MR. WEINREB: Yeah, I think the Russian witnesses
4 aren't on a plane until seven o'clock.

5 THE COURT: Well, let's keep our fingers crossed and
6 hope that will be the case.

7 MS. PELLEGRINI: Okay.

8 THE COURT: Okay? So I don't know how to handle this
9 publicly. I mean, do you want me to come out and make the
10 announcement?

11 MR. WEINREB: I think you should.

12 MS. CONRAD: Otherwise, they'll just ambush us.

13 THE COURT: Without the jury?

14 MR. WEINREB: Yeah, without the jury.

15 THE COURT: So Paul will deal with the jury.

16 THE CLERK: Do you want to find out first about their
17 availability before you go out there and say definitely
18 tomorrow?

19 THE COURT: Yeah, sure. Actually, why don't you go
20 out and ask them now. And as long as we have some time to
21 kill --

22 (Laughter.)

23 MS. CLARKE: Now that you have us here.

24 THE COURT: Right.

25 -- how about jury instructions? We're coming to the

1 point where that will be necessary.

2 MR. MELLIN: We have them ready to go.

3 MR. WEINREB: We've just been so consumed with other
4 things.

5 THE COURT: I understand. Well, now you'll have a day
6 off.

7 MR. WEINREB: So I know that the defense submitted a
8 list -- submitted a draft verdict form, and we have a draft one
9 too, but both of them now only have the aggravating factors in
10 them and I'm not sure what use that is. We need the one with
11 the mitigating factors.

12 MR. BRUCK: Well, the mitigating factors will
13 naturally have to be finalized to conform with the evidence,
14 plus there are -- there is an issue which the Court indicated
15 it was disposed to grant but we haven't completely resolved it.
16 It seemed like -- I understood you wishing the verdict form to
17 have everything. It wasn't primarily focused on the mitigating
18 factors which are a separate issue.

19 THE COURT: Well, can't we start with the ones you're
20 sure you'll have in there and then you can add if you think
21 that that's necessary after the rest? I mean, there's at least
22 a core that I think is kind of undeniable. The reason is that
23 it gives us a sense of how you want that -- how you want that
24 part of the verdict form organized, among other things.

25 MR. BRUCK: Well, in terms of that, sure. You know,

1 at the end of the evidence it's customary for the defense to
2 sort of reorganize the mitigating factors in the way that
3 really conforms to the way the evidence -- and it breaks them
4 up into two or -- so if we're not -- bound not to do that, we
5 can give you sort of an example of it based on what we've
6 already submitted that the Court can use to work from.

7 THE COURT: Right, we can move it around.

8 MR. WEINREB: Although, your Honor, it's the breaking
9 them up into two that is going to trigger the litigation in the
10 case. So the earlier that we have a draft version -- I mean, I
11 think what would be preferable would be an overinclusive draft
12 session rather than -- the Court had said what you're sure of
13 and then others could be added later. But if we could have all
14 of the proposed ones, that would make it possible to
15 expeditiously resolve any disputes that arise because it could
16 be a matter that needs to actually be briefed and argued and so
17 on.

18 MR. BRUCK: Well, I mean, part of our problem is the
19 government has been very aggressive about challenging --
20 objecting to things we're trying to put in, and it's a little
21 problematic to have anything resembling a final list of
22 mitigators in the proper -- with the proper structure and
23 emphasis before we know what we manage to get in front of the
24 jury, so...

25 But we can certainly put in what we've got so far and

1 do it that way.

2 THE COURT: Okay. I guess it will be a working draft
3 sort of thing. And again, I presume that pretty much the
4 instructions with some custom tailoring to this case,
5 obviously, will follow Sand's model. I assume everybody does
6 that.

7 MR. BRUCK: We are following your lead-in.

8 MS. CLARKE: Judge, the Waltham reconsideration is
9 pending.

10 THE COURT: We're waiting for --

11 MS. CONRAD: It's not a reconsideration; it's a
12 motion.

13 MS. CLARKE: It's a motion for an order for a
14 subpoena.

15 THE COURT: Right. We were going to get a response on
16 that?

17 MR. WEINREB: Yes. So we contacted --

18 THE CLERK: I explained to them the situation. You
19 have nine jurors who can't do it tomorrow -- I did a head
20 count -- because they have work, they have plans. Two were
21 like absolutely can't do it. And so I said, you know, be
22 honest. Just tell me. If you can't do it, you can't do it.
23 And they all raised their hands, so...

24 (Pause.)

25 MR. WEINREB: I hate to take somebody who has gone

1 this far and really wants to serve and has showed up and claims
2 that he is willing to do it.

3 THE COURT: Well, the alternative is to keep the
4 witnesses here.

5 MR. WEINREB: Till Monday.

6 THE COURT: Till Monday.

7 MR. MELLIN: Can we talk to the FBI about that, your
8 Honor?

9 THE COURT: Yeah. Why don't you talk about that. It
10 seems like those are the only alternatives: We go today
11 without him -- and the nurse is unequivocal that he can't sit
12 today and it would be an invitation to trouble, on the one
13 hand -- and adjourning until Monday with the witnesses here on
14 Monday.

15 MR. BRUCK: I think we can predict right now the FBI
16 is not going to favor staying until Monday and so --

17 THE COURT: Well, it's not necessarily preference,
18 it's can it be done logistically. I'm going to assume the
19 answer is yes.

20 MR. WEINREB: Obviously it could be done logistically,
21 the question is how weighty is their objection to it. So we'll
22 consult with them and we'll come back.

23 MR. FICK: I would just note briefly the original --
24 the parole grant was for a period of up to two weeks with
25 departure within 48 hours of testimony. And I understand that

1 there's a great logistical burden here; on the other hand, some
2 of the burden is of the executive branch's own making in the
3 sense there's sort of an overkill kind of control on these
4 people. You know, they also are more than ready to get out of
5 here, I have to say, given the kind of house arrest conditions
6 they're living under, so, but, you know.

7 THE COURT: Okay. Why don't you make your
8 consultations.

9 MS. CLARKE: We'll figure that out. We're just going
10 to need an answer on Waltham.

11 THE COURT: Yeah.

12 MR. WEINREB: So we notified --

13 MR. MELLIN: I'm going to step out and talk to them.

14 MS. PELLEGRINI: I'll go with him.

15 MR. WEINREB: We'll stay. Al and I will stay.

16 So we notified Waltham that this motion has been
17 filed.

18 MS. CONRAD: "Waltham" meaning the Waltham police?
19 There are three agencies.

20 MR. WEINREB: I'm sorry. We notified the Middlesex
21 District Attorney's Office that this had been filed.

22 MR. CHAKRAVARTY: Yeah. And so the upshot was from
23 the defense motion that there was a search warrant done -- a
24 federal search warrant done for certain samples that may
25 contain blood that -- for analysis, and the defense seized upon

1 the fact that they don't have the results of that analysis to
2 suggest there is something else out there.

3 We contacted Middlesex, Middlesex sent over the
4 analysis report of the blood analysis, and it revealed that
5 there was no DNA profile that could be matched. So there was
6 no DNA profile at all in any of the samples that they took, and
7 so that there's no new information for purposes of matching to
8 anything that might corroborate the -- either Tamerlan or
9 Todashev's participation in the murder.

10 MS. CONRAD: Was a sample -- I'm sorry. Were you
11 done?

12 MR. CHAKRAVARTY: In terms of the new information that
13 we have, that's the new information.

14 MS. CONRAD: So there are two aspects to this: One
15 was in the original motion and one was in the supplemental
16 memorandum that I filed. The government has consistently taken
17 the position that its -- first of all, it's an ongoing
18 investigation. So now Mr. Chakravarty says there's no new
19 information, which suggests that it's not an ongoing
20 investigation and, therefore, the invocation of the law
21 enforcement privilege way back when this issue was first raised
22 which Mr. Weinreb even said was tacking closer to the wind on
23 this issue is perhaps not validly invoked if there is no new
24 information.

25 To the extent that -- the government has also taken

1 the position that they do not -- are not in possession of the
2 information regarding the investigation, that the investigation
3 is being run solely by state officials, whether they be in the
4 DA's office, in the state police or in Waltham. So that's why
5 we filed the motion for an order to those agencies to
6 provide -- for in camera review, if necessary, that
7 information.

8 And just to put it in context again, the reason, your
9 Honor, as I understood it ruled that we could not bring out
10 evidence of the Waltham murders and Tamerlan's involvement is
11 because we didn't have sufficient evidence to meet a threshold
12 to show that he was involved. The government is taking the
13 position that whatever information exists is in the possession,
14 custody and control of state actors and they don't have access
15 to it, so the logical next step is for us to find out what
16 information exists within the hands of the state actors.

17 We used the example of the search warrant to indicate
18 that a federal search warrant was used to obtain these samples
19 and something like the results of that might be relevant.
20 There's also other indications that the FBI has been involved
21 in this investigation including the fact that in a 302
22 disclosed last week regarding Matanov, he was questioned at
23 length, and that was the supplemental memorandum, regarding the
24 Waltham murders and his knowledge of the Waltham murders and
25 his knowledge of Todashev who was apparently his roommate at

1 the time.

2 So there are two prongs to this: The first is really
3 just simply we would like a court order to produce whatever
4 state agency information exists for in camera review and to
5 disclose under whatever protective order is necessary
6 information indicating that Tamerlan Tsarnaev was, in fact, a
7 participant in those murders. Just as example, the Matanov 302
8 asks about money wired over to Russia in the aftermath of the
9 murders, quote, in the amount of the proceeds of the robbery.

10 Well, it's never been publicly reported, to my
11 knowledge, that there was a robbery. This indicates that the
12 FBI was aware of the amount of money that was sent over. I
13 think the clear implication is that the -- that Matanov got the
14 money from either Tamerlan or Todashev -- the implication is
15 Tamerlan because they talk about him not sending money over
16 when Tamerlan is in Russia. So it seems like the government
17 has additional information. So that's the second prong.

18 The first part is we would like a court order to the
19 state agencies. The second part is -- if there's no
20 information, there is no information. End of story.

21 The second part is we would like the government to
22 produce for in camera review any information it now has, as
23 opposed to the information it had a year and some months ago,
24 regarding Tamerlan's involvement for in camera review because
25 to say we haven't met a burden without us having access to the

1 information that would permit us to meet that burden it seems
2 to me would be fundamentally unfair.

3 MR. WEINREB: So to the extent that the federal
4 government has any information relating to Tamerlan Tsarnaev's
5 potential involvement in the Waltham triple homicide, we have
6 reviewed it and have produced to the defense everything that in
7 our judgment is either favorable material evidence or material
8 to the preparation of the defense. There would be nothing for
9 us to give the Court for in camera review that I know of.
10 Everything that we have, which is basically nothing, has been
11 turned over to the defense or has already been turned over to
12 the Court for in camera review.

13 It does, in fact, however, remain the case that the
14 Middlesex District Attorney's Office is conducting its own
15 investigation into the triple homicide, as it has been ever
16 since the homicide occurred, and that they have steadfastly
17 maintained that that needs to be kept confidential and they
18 have not shared their file with us despite requests.

19 I think they have been concerned, not without reason,
20 that anything that is revealed to us in the course of this case
21 could easily wind up in the hands of defense attorneys who may
22 have, you know, involvement with people who they believe may be
23 implicated in the case or without the defense's knowledge,
24 maybe even without the Middlesex District Attorney's knowledge
25 and they simply have deemed it inconsistent with the goals of

1 their investigation to share it with us and, therefore, have
2 declined to do so.

3 So that much we agree with the defense, that what's in
4 their files, we don't know, but what's in our files, we do
5 know, and we believe we have handled it appropriately.

6 THE COURT: So you're not going to file a written
7 response to the motions, then? I mean, that's --

8 MR. WEINREB: No, I think we should. I think we
9 should and we'll do that over this -- if there's a break here,
10 we'll do it over the break.

11 THE COURT: Okay. I guess --

12 MR. WEINREB: So we'll see what the FBI says --

13 THE COURT: See what the answer is.

14 MR. WEINREB: -- and come back.

15 MS. CLARKE: One other issue --

16 THE COURT: Let me put my thumb on the scale. I think
17 that's the preferred solution.

18 MR. WEINREB: Is to wait until Monday?

19 THE COURT: Yeah, rather than disrupt the jury. And
20 my concern is the integrity of the case.

21 MR. WEINREB: No, I understand.

22 THE COURT: And I think that is the better choice.

23 MS. CLARKE: Judge, I found out yesterday that the
24 Court had denied the Elmirza motion. And I haven't been able
25 to put my hands on that order so that we could raise

1 whatever --

2 THE COURT: We'll -- if you haven't been sent -- it's
3 under seal, so the clerk will send you a paper copy or an image
4 or whatever. We'll make sure that happens.

5 MR. CHAKRAVARTY: This is the motion to compel parole?

6 MS. CLARKE: That was our motion. So I don't know
7 whether the Court offered other alternatives.

8 THE COURT: Well, the alternative is, I think -- I
9 don't know whether the order did it, we talked about it -- is a
10 video hookup. We set that up once before. I'm sure we can set
11 it up again. He's in Almaty.

12 MS. CLARKE: Right. We were just sort of counting the
13 minutes down because it's not like it can be set up like that,
14 so...

15 MR. CHAKRAVARTY: So if the government's involvement
16 is going to be necessary for that; for example, if it's going
17 to be done in a U.S. government facility, then we would need to
18 talk about it.

19 MS. CLARKE: We would have to contact you. I would
20 like to see the order.

21 MR. CHAKRAVARTY: Tomorrow is a holiday, apparently,
22 in Kazakhstan. So it could be done next week.

23 MR. BRUCK: May 1st. That's right. Hence, the suit.
24 It's May Day.

25 THE COURT: All right. Okay. So I'll be out in a

1 little while. We'll find out, I guess, the answer. And if we
2 have to confer further, we will.

3 (The proceedings adjourned at 10:10 a.m.)

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I, Marcia G. Patrisso, RMR, CRR, Official Reporter of
the United States District Court, do hereby certify that the
foregoing transcript constitutes, to the best of my skill and
ability, a true and accurate transcription of my stenotype
notes taken in the matter of Criminal Action No. 13-10200-GAO,
United States of America v. Dzhokhar A. Tsarnaev.

9
10 /s/ Marcia G. Patrisso
11 MARCIA G. PATRISSO, RMR, CRR
12 Official Court Reporter

13 Date: 2/1/16

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